BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 97-248
	)	
Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage	)	RM No. 9097

REPLY COMMENTS OF HOME BOX OFFICE

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February 23, 1998

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Implementation of the Cable	)	
Television Consumer Protection	)	CS Docket No. 97-248
and Competition Act of 1992	)	
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Ameritech New Media, Inc.	)	RM No. 9097
Regarding Development of	)	
Competition and Diversity in	)	
Video Programming Distribution	)	
and Carriage	)	

REPLY COMMENTS OF HOME BOX OFFICE

Home Box Office ("HBO") files these reply comments in response to the Commission's Notice of Proposed Rulemaking in the above captioned proceeding.[1]

The initial comments in this proceeding demonstrate that major changes to the program access rules are unjustified. No party was able to explain how the Commission's past resolution of program access complaints has been ineffective or dilatory. To the contrary, the record demonstrates that the current rules have

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[1] Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CS Docket No. 97-248, FCC 97-415 (released December 18, 1997) ("Notice").

been successful in preventing and resolving program access disputes. While HBO does not oppose certain Commission efforts to streamline the program access rules,[2] the notion that drastic changes are necessary to the efficacy of the program access rules is simply insupportable.

In these reply comments, HBO reiterates its opposition to the proposals of certain parties that the Commission adopt a damages remedy and allow discovery as of right.[3]

1. A Damages Remedy Is Unnecessary and Would Be Extremely Costly And Burdensome.

No party presented any evidence that a damages remedy is necessary to the efficacy of the program access rules. It is uncontested that program access violations have been exceedingly rare, with only three decisions against a programmer in the five-year history of the rules.[4] Contrary to the assertions of one commenter,[5] there is also no evidence that the frequency of complaints is increasing. In fact, since January 1, 1997, only 6

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[2] Specifically, HBO does not oppose reasonable deadlines that would streamline the program access process, nor does it oppose the removal of the joint and several liability requirement for buying groups. See Comments of Home Box Office in CS Docket No. 97-248 at 4-8 (filed February 2, 1998).

[3] See id. at 9-24.

[4] See id. at 3, 18.

[5] See Comments of the Consumer Union et al. at 11 (arguing that damages are necessary due to recent increases in the frequency of program access complaints).

complaints have been filed with the Commission, as opposed to an average of 8 complaints filed per year from 1993-1996.[6]

Nor has any commenter provided a reason why the Commission's current forfeiture power does not already provide a sufficient monetary deterrent to program access violations. Indeed, Ameritech and other parties agree that the Commission's ability to levy forfeitures under Title V of the Communications Act provides the Commission ample power to impose effective penalties.[7] Given that the Commission has never used this forfeiture power, it would appear particularly unnecessary to adopt a complex set of regulations and procedures designed to provide the Commission an additional monetary deterrent.

Nonetheless, Ameritech and other parties maintain that damages are necessary as a "stick" to motivate programmers to comply with the program access rules. If, in fact, these parties are genuinely seeking compliance with the rules, then the appropriate remedy is forfeitures. As noted, that remedy already is available. Moreover, nowhere in Section 628 or its legislative history is there any indication that Congress

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[6] These numbers were derived based on the Cable Services Bureau's monthly public notices documenting the receipt of program access complaints filed with the Commission.

[7] See, e.g., Ameritech Comments at 20 (supporting the use of forfeitures as a monetary deterrent); Encore Comments at 11 (noting that forfeitures of up to $7,500 per day impose a "formidable" monetary deterrent).

intended for the program access rules to provide retroactive relief for past injuries.[8] In fact, the Commission effectively rejected the notion that the program access rules should be a vehicle for recovering specific damages when it declined to require complainants to show harm as a predicate to a program access violation.[9]

Other parties appear to seek a damages remedy for no other reason than to gain an economic windfall. For example, the Small Cable Business Association ("SCBA") proposed that a programmer found in violation of the program access rules be forced to provide its programming to the complainant for a two-year period at a 20 percent discount.[10] This discount would be imposed regardless of the injury suffered by the complainant or the degree of the violation by the programmer, and would give the complainant a significantly lower rate than the MVPDs with which it competes. Thus, SCBA's "damages" proposal appears to have no purpose other than to provide MVPDs an unwarranted economic benefit at the expense of the programmer and other competing distributors.

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[8] See, e.g., 47 U.S.C. §§ 548(b) & (c)(1) (instructing the Commission to create prohibitions on future conduct).

[9] See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, First Report and Order, MM Docket No. 92-265, 8 F.C.C.R. 3359, ¶ 47 (1993).

[10] See SCBA Comments at 14.

Similarly, certain parties argued that programmers should be liable for damages incurred before a program access complaint is even filed.[11] These parties argue that damages should be assessed from the date a programmer first offers a rate which is later found discriminatory. Thus, even though the parties may still be in the process of negotiating a program agreement in good faith during this pre-complaint period, a programmer could nonetheless be held liable for the rates it offers during this negotiation period. Other parties suggested that damages be calculated from the time that the complainant sends a notice of intent to file a program access complaint.[12] The result of adopting this proposal would be to encourage MVPDs to send notices simply to start the damage meter running and in order to gain leverage in negotiations, regardless of the merits of the claim.

Commenters arguing that the Commission adopt a damages remedy also ignore the exceedingly complex and costly procedures a damages remedy would entail.[13] As the Commission has stated in

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[11] See, e.g., BellSouth Comments at 19; EchoStar Comments at 11; GTE Comments at 12.

[12] See Comments of American Programming Service et al. at 13; Comments of the Consumers Union et al. at 13.

[13] See Comments of American Programming Service et al. at 13-14; Ameritech Comments at 20; Bell Atlantic Comments at 8; BellSouth Comments at 18; Comments of the Consumers Union et al. at 11-12; DirecTV Comments at 23-24; EchoStar Comments at 8-9; GTE Comments at 11-13; NRTC Comments at 5-10; RCN Telecom

(continued ...)

the common carrier context, the assessment of damages involves "issues of extraordinary factual and/or legal complexity, the resolution of which may require substantial expenditures of time and resources."[14] The Commission found that the award of damages requires a "detailed and time-consuming investigation of the facts"[15] involving expansive discovery,[16] the use of administrative law judges,[17] and extended discussions between the parties.[18] As a result, the Commission acknowledged that, even under its recently streamlined procedures, the assessment of damages could take an additional twelve months[19] -- nearly 4 months longer than the average time it takes to resolve a program access complaint under the Commission's current procedures.[20]

(... continued)

Services Comments at 8-11; SNET Comments at 4-5; Wireless Cable Association Comments at 15-16.

[14] See Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers, Report and Order, CC Docket No. 96-238, FCC 97-396, at ¶ 185 (released November 25, 1997) ("Common Carrier Complaint Order").

[15] Id. at ¶ 195.

[16] Id. at ¶ 171.

[17] Id. at ¶ 202.

[18] Id. at ¶¶ 194-195.

[19] Id. at ¶ 185.

[20] See Notice at ¶ 37 (noting that the average program access complaint is resolved in 8.1 months).

Section 628 was simply not intended to mire the Commission in such protracted adjudicatory proceedings. To the contrary, Congress expressed an overriding concern that the Commission's rules resolve program access complaints expeditiously.[21] Adding a lengthy, fact-intensive damages assessment to the end of the program access proceeding is antithetical to this mandate.

In fact, the comments in this proceeding reveal that damage disputes in program access proceedings would be even more burdensome than those the Commission has encountered in the common carrier context.[22] This is because, unlike in the common carrier context, there is no tariffed or otherwise prescribed rate upon which a program access damages assessment can be based. Thus, program access damages cannot be calculated by simply comparing a tariffed rate to the actual rate charged. Rather, the Commission would be forced to calculate a "reasonable" programming rate[23] and/or conduct a highly speculative determination of "lost profits."[24] Either endeavor would impose

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[21] See 47 U.S.C. § 548(f)(1).

[22] See, e.g., Bell Atlantic Comments at 8 (proposing various measures necessary to calculate damages in program access cases).

[23] See, e.g., id. (proposing that damages be calculated by subtracting the amount charged an MVPD from the amount the MVPD "should have been charged"); EchoStar Comments at 11 (same).

[24] See, e.g., Ameritech Comments at 23 (proposing that damages be calculated based on "lost profits"); Bell Atlantic Comments at 8 (same).

substantial additional burdens on the Commission's limited time and resources.

Americast's proposal to bifurcate damage assessments from the initial determination of liability does not alleviate this problem. Bifurcation does not eliminate the need to adopt and implement complex damage assessment procedures in those instances where a violation has occurred. Indeed, the Commission has previously found that bifurcation can actually increase the total amount of time and resources necessary to finally resolve a complaint.[25]

In sum, there is no evidence in the record to support a damages remedy, and such a remedy would unnecessarily increase the cost and delay the resolution of program access complaints. Consequently, HBO urges the Commission not to adopt a new damages remedy.

2. Discovery As of Right Creates a Strong Potential For Abuse By MVPDs Seeking Unfair Access To Programmers' Proprietary And Confidential Business Information.

The initial comments in this proceeding verify HBO's concern that discovery as of right in program access proceedings would allow MVPDs to abuse the Commission's processes in order to gain an unfair advantage in contract negotiations. Indeed, parties

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[25] See Common Carrier Complaint Order at ¶ 172 (noting that "the overall proceeding could be significantly longer if liability was found and damages were decided in a second, separate proceeding").

have already evinced their intent to use the discovery process for the purpose of gaining unwarranted access to a programmer's proprietary business information. Specifically, Ameritech requests that the Commission adopt discovery rules that would require programmers to produce all contracts between the programmer and all competing MVPDs in all DMAs the complainant serves or reasonably expects to serve.[26] This sweeping request would provide any complaining MVPD instant access to nearly every programming contract in the programmer's possession, regardless of whether such contracts are necessary to the resolution of the program access complaint.

Similarly, the SCBA requests that complainants be allowed to access a programmer's proprietary business information before having to even file a complaint.[27] Thus, programmers would be forced to disclose confidential materials regardless of whether or not the complainant could articulate a prima facie case of program access violation. By foregoing the requirement that a program access dispute exist before requesting discovery, SCBA abandons any notion that such discovery is being sought for the purpose of resolving a program access dispute.

In addition, Ameritech asks that programming contracts

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[26] Ameritech Comments at 15.

[27] SCBA Comments at 10-13.

obtained through discovery be made available to persons involved with programming decisions and negotiations -- the very individuals capable of inflicting the most harm on the submitting programmer.[28] Aside from Ameritech's incredulous claim that personnel shortages prevent it from assigning the tasks of negotiating programming contracts and handling program access disputes to separate persons,[29] Ameritech does not and cannot offer any justification for why persons involved in negotiating programming contracts must have access to a programmer's confidential contracts in order for the Commission to resolve a program access dispute. Rather, this extraordinary and unprecedented proposal simply exposes Ameritech's desire to obtain proprietary and confidential information in order to gain an unfair advantage in contract negotiations. Such requests on the part of Ameritech and other parties typify how MVPDs would abuse discovery as of right and demonstrate exactly why the Commission should decline to modify its current discovery rules.

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[28] See Ameritech Comments at 17.

[29] Id.

CONCLUSION

For the foregoing reasons, the Commission should refrain from making unnecessary and unwarranted changes to its program access rules and instead limit its actions to those consistent with HBO's initial comments and these reply comments.

Respectfully submitted,

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